

PROPOSED COAL RULE AMENDMENTS

The department's periodic review (per 2-4-314, MCA) of state land coal leasing rules found several rules containing inconsistencies with current statute or other administrative rules; one rule addressing lease sale notification provisions that could be improved by incorporating website and email technology; and one rule containing a provision reducing royalties for private use. These proposed amendments would revise the following rules:

- 36.25.301(1)(f): Revise definition of "foreign interests" to conform to current statutory definition. (77-3-305(1), MCA)
- 36.25.303(1): Revise requirements for qualified lessees to reflect statutory provisions. (77-3-305(1), MCA)
- 36.25.304(4)(b): Revise application fee to match fee proscribed in ARM 36.2.1003(1).
- 36.25.304(6)(a) & (b): Revise lease sale process to incorporate website and email technology.
- 36.25.310(2): Revise coal valuation provisions to remove reference to a repealed Department of Revenue statute (15-35-109, MCA), and replace with reference to applicable DNRC statutes (77-3-312 and -316(4), MCA).
- 36.25.315(2): Delete provision authorizing automatic lease termination for contracting with foreign interests.
- 36.25.321(4): Delete provision authorizing reduced royalty rates for private use of coal.

A draft notice for these proposed rule revisions is attached, as are the referenced statutes. The department requests Land Board authorization to initiate the rule amendment process.

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION

In the matter of the proposed)	NOTICE OF PUBLIC
amendment of: ARM 36.25.301, definitions;)	HEARING UPON
ARM 36.25.303, qualified coal lessees;)	PROPOSED RULE
ARM 36.25.304, procedures for issuance)	AMENDMENTS
of coal leases; ARM 36.25.310, coal)	
royalties; ARM 36.25.315, coal lease)	
forfeiture, cancellation, and termination;)	
and ARM 36.25.321, fees.)	

To: All Concerned Persons

1. On _____, 2008, at 1:00 p.m., the Department of Natural Resources and Conservation will hold a public hearing in the _____, at the Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, Montana, to consider the amendment of the above-stated rules.

2. The department will make reasonable accommodations for persons with disabilities who wish to participate in this public hearing or need an alternative accessible format of this notice. If you require an accommodation, contact the department no later than 5:00 p.m. on _____, 2008, to advise us of the nature of the accommodation that you need. Please contact Monte Mason, Montana Department of Natural Resources and Conservation, P.O. Box 201601, Helena, MT 59620, (406) 444-3843, fax (406) 444-2684, e-mail mmason@mt.gov.

3. The rules as proposed to be amended provide as follows, stricken matter interlined, new matter underlined:

36.25.301 DEFINITIONS (1) When used herein, unless a different meaning clearly appears from the context:

(a) "Board" means the board of land commissioners of the state of Montana;

(b) "Commercial quantities" means that quantity of coal which can be sold at profit in the commercial market;

(c) "Coal" means and includes black or brownish-black solid fossil fuel which has been subjected to the natural process of coalification and which falls within the classification of coal by rank: I, anthracite; II, bituminous; III, sub-bituminous; IV, lignite;

(d) "Department" means department of natural resources and conservation;

(e) "Director" means director of the department of natural resources and conservation, chief administrative officer of the department;

(f) ~~"Foreign interests" means states of governmental subdivisions of states foreign to the United States, other than Canada or Mexico; business entities~~

~~organized under the laws of any state foreign to the United States, other than Canada or Mexico; and persons who are citizens of any state foreign to the United States, other than Canada or Mexico;~~

(f) "Interests foreign to the United States" means countries, states, or governmental subdivisions other than those within the United States of America.

(g) "Lessee" means the person in whose name and coal lease appears of record in the offices of the department, whether such person be the original lessee or a subsequent assignee. The term "lessee" also includes, where the context of the rule may indicate, any person who is the apparent successful bidder for a coal lease but with whom a formal coal lease agreement has not been completed and finalized;

(h) "Person" means any individual, firm, association or corporation or other legal entity;

(i) "Qualified applicant" means any person who may become a qualified lessee as set forth herein;

(j) "State" means the state of Montana;

(k) "State lands" means all lands the leasing of which for coal purposes is under the jurisdiction of the board;

(l) "Value" means the contract sales price as defined in [15-35-102 MCA](#).

AUTH: 77-3-303, MCA

IMP: 77-3-303, 77-3-305, MCA

REASONABLE NECESSITY: The amended definition of "interests foreign" is reasonably necessary so as to keep the term consistent with the provisions of Section 77-3-305, MCA. Section 77-3-305, MCA allows foreign citizens and business entities to acquire state coal leases, provided that their country of origin allows reciprocal privileges to U.S. citizens.

[36.25.303 WHO MAY LEASE FOR COAL -- QUALIFIED LESSEES](#)

(1) Any person, qualified under the constitution and laws of the state of Montana, ~~except corporations, the majority of the stock of which is controlled by foreign interests,~~ may lease state lands for coal purposes provided that:

(a) all corporations not incorporated in Montana must obtain a certificate of authority to transact business in this state from the secretary of state;

(b) no officer or employee of any agency of the executive department of state government who is required to inspect or examine field information in regard to prospecting for coal or the mining thereof, may take or hold such lease;

(c) the applicant, if a natural person, has reached the age of 18 years.

(d) no citizen of a foreign country is eligible to obtain and hold a state coal lease unless the citizen's country provides for similar or like privileges to citizens of the United States. Likewise, no partnership, corporation, association, or other legal entity controlled by interests foreign to the United States is eligible to obtain and hold a state coal lease unless the entity's country provides for similar or like privileges to citizens of the United States.

(2) Any person qualified to hold a coal lease on state lands may acquire, receive and hold more than one lease.

AUTH: 77-3-303, MCA

IMP: 77-3-303, 77-3-305, MCA

REASONABLE NECESSITY: The amendment to the definition of "qualified lessees" is reasonably necessary so as to be consistent with the provisions of Section 77-3-305, MCA, which allows foreign citizens and business entities to acquire state coal leases, provided that their country of origin allows reciprocal privileges to U.S. citizens.

36.25.304 PROCEDURES FOR ISSUE OF LEASE (1) The land shall be leased in as compact bodies as the form and areas of the tract held by the state and offered for lease will permit. No lease may embrace non-contiguous subdivisions of lands unless such subdivisions are within an area comprising not more than one square mile.

(2) No state coal lease may be issued until the coal resources and the surface of the tract to be leased have been evaluated as provided for in 77-3-312, MCA. No coal lease may be issued for less than the fair market value of the coal included under the lease.

(3) Tracts may be offered for lease pursuant to an application submitted by a qualified lessee, or by the department of its own volition.

(4) An application to have a tract offered for lease may be made at any time during the year on a form provided by the department.

(a) Such application shall contain the information called for therein, including an adequate and sufficient description of the lands sought to be leased.

(b) Such application shall be accompanied by a ~~\$10.00~~ \$50.00 application fee. Applications not accompanied by the application fee will not be considered.

(5) Where more than one application is filed on any one tract, the department shall notify each person submitting an application subsequent to the first qualified application that there is a prior application for that tract. All subsequent application fees shall be returned. This is the only instance in which the application fee may be refunded.

(6) When sufficient applications have been received to warrant a sale, or at the director's discretion, a lease sale will be announced.

(a) Notice of a lease sale shall be posted on the department's website and given by publication published in a trade journal of general circulation in the coal mining industry or in the major newspapers of general circulation within Montana each week for 4 weeks preceding the date of sale. The notice shall identify the county or counties within which ~~contain a list of the tracts are being offered for lease, state the date of the lease sale, and provide instructions on how to obtain detailed information from the department on the specific tracts to be offered, and describe the bidding requirements and procedures, and contain other information as is appropriate.~~

(b) The department shall maintain a master mailing list of prospective coal lessees who request, in writing, that their names be placed on such list; and

concurrently with the publication of the notice of sale in the newspapers or trade journal, the board shall mail or e-mail to each addressee on the master mailing list a copy of the notice of sale. However, such mailing shall not be deemed a legal prerequisite to a valid sale. Furthermore, the board shall have no liability to any person who may be inadvertently omitted in the mailing of such additional notices.

(c) Sales of state coal leases will be by competitive bidding. The board may call for bids on the percentage of royalty to be paid by the lessee, on a first year cash bonus to be paid by the lessee, or both; but unless the sales notices state that bids on the percentage of royalty will be called for on particular leases, all leases will be sold by bidding on the first year bonus alone.

(7) The board may require bidding to be by submission of written sealed bids, by oral bidding or by a combination of both. When sealed bids are required, the notices of sale will so state as to particular leases and will designate a date by which bids must be submitted. Where the sales notices do not state otherwise, all bidding will be oral.

(8) Subject to the board's right to reject any and all bids:

(a) When bidding is on a cash bonus basis, the lease will be awarded to the qualified applicant who submits a bid of the highest cash amount per acre;

(b) When bidding is on a percentage of royalty basis, the lease will be awarded to the qualified bidder who submits a bid of the largest percentage of royalty to be paid. No bid of less than 10% of the f.o.b. price of the coal prepared for shipment excluding that amount charged by the seller to pay taxes on production will be accepted;

(c) When bidding is on a cash bonus and percentage of royalty basis the board will determine which bid is to the best advantage of the state and award the lease accordingly.

(9) When sealed bids have been required and there is a tie for high bid, the highest bidder will be determined by oral auction among the tied bidders. If no oral bid is offered which is higher than the sealed bids, the highest bidder will be determined by lot. If no bid is made on a tract offered for lease, no lease will be awarded for that tract.

(10) The department may require a bid deposit in any amount it may determine, up to 10% of the appraised value of the coal offered for lease under any tract. When such a deposit is to be required, notice of the requirement shall be given in the notice of the lease sale.

(11) When bidding is by submission of sealed bids and a bid deposit is required the deposit shall accompany the bid. When bidding is oral and a bid deposit is required, the deposit must be submitted prior to the opening of bidding.

(12) An applicant or successful bidder shall pay a \$25.00 administrative fee for issuance of any coal lease.

AUTH: 77-3-303, MCA

IMP: 77-3-303, 77-3-312, MCA

REASONABLE NECESSITY: The amendment to the coal lease sale notification process is reasonably necessary to up-date the process to allow notification via e-mail and the Department's website, and to up-date the coal lease application fee so as to conform the rule to the provisions of ARM 36.2.1003(11).

36.25.310 ROYALTIES (1) The lessee shall pay in cash a royalty on all coal produced from the leased premises at a rate of not less than 10% of the value of the coal.

(2) The fair market value of the coal shall be determined by the Board in accordance with ~~15-35-109~~ 77-3-312 and 77-3-316(4), MCA. ~~This statute, in conjunction with 15-35-102 (1), MCA, requires that the value of the coal for royalty purposes shall be either the price of the coal extracted and prepared for shipment f.o.b. mine, excluding that amount charged by the seller to pay taxes paid on production, or a price imputed by the department of revenue under 15-35-107, MCA, which authorizes the department of revenue to impute a value to the coal which approximates market value f.o.b. mine, under certain conditions including utilization of the coal by the operator and sales under a contract which is not an arm's length agreement.~~

(3) On or before the last day of each month every holder of a producing coal lease shall make a report to the department, on a form the department prescribes, showing the number of tons mined during the preceding calendar month, the price obtained therefor at the mine, the total amount of all sales and any additional information required by the department. The report shall be signed by the lessee or some responsible person having knowledge of the facts reported and be accompanied by payment of the royalty due the state for the preceding month as shown by the report.

(4) The lessee shall report any adjustments to the sales price of the coal which affect the sales price as previously reported in the monthly reports within 30 days of the adjustment. The royalty shall be adjusted accordingly.

AUTH: 77-3-303, MCA

IMP: 77-3-312, 77-3-316, 77-3-317, MCA

REASONABLE NECESSITY: The amendment to coal royalty valuation is reasonably necessary so as to delete references to repealed statutes and to conform the rule to the provisions of Sections 77-3-312, -316, and -317, MCA.

36.25.315 FORFEITURE, CANCELLATION, AND TERMINATION OF LEASES (1) If the lessee fails to comply with any provisions of state law relating to coal leases, the provisions of these rules, or the provisions of its coal lease, the department shall give lessee written notice specifying such failure. Lessee shall have a period of 60 days following such notice to cure the failure so specified. Failure to so cure may result in cancellation of the lease by the board. Any lessee whose lease has been so canceled has the right to a hearing pursuant to the Montana Administrative Procedure Act and the regulations of the department.

~~(2) Upon a finding at a hearing held in accordance with the Montana Administrative Procedure Act, that a lessee has contracted with any foreign interest for the sale of coal, the lease shall automatically terminate.~~

AUTH: 77-3-303, MCA

IMP: 77-3-303, MCA

REASONABLE NECESSITY: The amendment to ARM 36.25.315(2) is reasonably necessary so as to eliminate forfeiture of the lease solely due to a sale of coal to any foreign purchaser.

36.25.321 FEES The department shall assess the following fees:

- (1) for application for coal lease - ~~\$10.00~~ \$50.00;
- (2) for issuance of each coal lease - \$25.00;
- (3) for filing each assignment affecting a coal lease, or interest therein, of whatever nature - \$10.00;
- ~~(4) for royalties on coal mined for private use not exceeding 30 tons of 2,000 pounds - \$5.00.~~

AUTH: 77-3-303, MCA

IMP: 77-3-303, MCA

REASONABLE NECESSITY: The amendment to ARM 36.25.321 is reasonably necessary so as to up-date the application fee so as to conform the rule to the provisions of ARM 36.2.1003(11) and to eliminate coal leases for minor private use.

4. Concerned persons may submit their data, views, or arguments, either orally or in writing, at the hearing. Written data, views, or arguments may also be submitted in writing to Monte Mason, Department of Natural Resources and Conservation, 1625 Eleventh Avenue, Helena, MT 59620; fax (406) 444-2684; or e-mail mmason@mt.gov, and must be postmarked no later than _____, 2008.

5. Monte Mason, Minerals Management Bureau Chief, Department of Natural Resources and Conservation, has been designated to preside over and conduct the hearing.

6. An electronic copy of this Notice of Public Hearing on Proposed Amendment is available through the department's web site at <http://www.dnrc.mt.gov>. The department strives to make the electronic copy of this Notice of Public Hearing on Proposed Amendment conform to the official version of the Notice, as printed in the Montana Administrative Register, but advises all concerned persons that in the event of a discrepancy between the official printed text of the Notice and the electronic version of the Notice, only the official printed text will be considered.

7. The department maintains a list of interested persons who wish to receive notices of rulemaking actions proposed by this agency. Persons who wish to have their name added to the list shall make a written request that includes the name, email, and mailing address of the person to receive notices and specifies that the person wishes to receive notices regarding conservation districts and resource development, forestry, oil and gas conservation, trust land management, water resources, or a combination thereof. Notices will be sent by e-mail unless a mailing preference is noted in the request. Such written request may be sent or delivered to the contact person in (4) above or may be made by completing a request form at any rules hearing held by the department.

8. The bill sponsor notice requirements of 2-4-302, MCA, do not apply.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

MARY SEXTON
Director
Natural Resources and Conservation

TOMMY H. BUTLER
Rule Reviewer

Certified to the Secretary of State on _____, 2008.

REFERENCED STATUTES

77-3-305. Limitations on leasing. The board shall not issue leases:

(1) to any citizen of another country or any person, partnership, corporation, association, or other legal entity controlled by interests foreign to the United States unless such country provides for similar or like privileges to citizens of the United States; or

(2) if, after a determination of the amount, location, and quality of the coal on the lands for lease, the extraction of the coal from such lands by strip-mining methods would adversely affect the methods of recovery of deep minable coal from such operations on such lands in the future.

History: En. 81-511 by Sec. 6, Ch. 358, L. 1975; R.C.M. 1947, 81-511(part); amd. Sec. 1, Ch. 127, L. 1983.

77-3-312. Leasing procedures. Prior to issuing a coal mining lease, the board shall evaluate the coal and land proposed to be leased for the purpose of determining the fair market value of any coal reserves located on the land, giving opportunity for and consideration to public comments on such evaluation. Leases shall be awarded by a competitive bid system, including a bonus bid for the first year's rental, and no lease shall be awarded at less than fair market value.

History: En. Sec. 38, Ch. 60, L. 1927; re-en. Sec. 1805.38, R.C.M. 1935; amd. Sec. 30, Ch. 428, L. 1973; amd. Sec. 1, Ch. 358, L. 1975; R.C.M. 1947, 81-501(part).

77-3-316. Rental and royalty terms. (1) The compensation of the state under all coal mining leases shall be upon a rental and royalty basis and shall be fixed and determined by the board.

(2) The rental and royalty terms of each lease shall be subject to readjustment to reflect fair market value at the end of its primary term of 10 years and at the end of each 5-year period thereafter if the lease is producing coal in commercial quantities.

(3) The rental shall be on a per acre basis but in no case shall it be less than \$2 per acre.

(4) The amount of such royalty shall be based upon the kind, grade, and character of the coal in each particular mine; upon the size, shape, and nature of the coal vein, strata, or body; and upon the shipping and marketing facilities for the product. Consideration shall also be given to every other known factor affecting the value of each particular coal mining lease; but in no case shall the royalty for the coal mined be less than 10% of the f.o.b. mine price of a ton prepared for shipment.

History: (1), (3), (4)En. Sec. 40, Ch. 60, L. 1927; re-en. Sec. 1805.40, R.C.M. 1935; amd. Sec. 3, Ch. 358, L. 1975; Sec. 81-503, R.C.M. 1947; (2)En. Sec. 39, Ch. 60, L. 1927; re-en. Sec. 1805.39, R.C.M. 1935; amd. Sec. 5, Ch. 257, L. 1965; amd. Sec. 1, Ch. 121, L. 1967; amd. Sec. 6, Ch. 22, L. 1971; amd. Sec. 1, Ch. 291, L. 1971; amd. Sec. 31, Ch. 428, L. 1973; amd. Sec. 2, Ch. 358, L. 1975; Sec. 81-502, R.C.M. 1947; R.C.M. 1947, 81-502(part), 81-503.